88-1060

Supreme Court, U.S.
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No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH E. POWERS,
Petitioner,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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QUESTION PRESENTED FOR REVIEW

Did the Kansas Supreme Court err in approving the trial Court's decision, as well as that of the Kansas Court of Appeals, in denying that the Petitioner possessed a constitutionally protected property interest in his employment with the Respondent County and thereby deprived him of his property without due process of the law under the 14th Amendment to the U. S. Constitution?

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OPINION BELOW

The order of the Kansas Supreme Court denying review is reported at Case No. 87-60767-A, dated August 26, 1988, and attached hereto as Appendix A. The unpublished opinion of the Kansas Court of Appeals is reported as Case No. 60,767, dated June 24, 1988, and attached hereto as Appendix B.

JURISDICTION

The opinion of the Kansas Court of Appeals was filed June 24, 1988. The order of the Kansas Supreme Court denying review was filed August 26, 1988.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). The instant petition for a writ of certiorari is filed within the period of extension granted by Associate Justice Byron R. White on November 22, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 1, 1978, the Appellant was hired by the Appellee, Kingman County, Kansas, through a government CETA Program. A year later he was hired as a permanent county employee. His duties were those of a general laborer with the Kingman County Public Works Department, initially with the road and bridge crew and then in solid waste collection, a trash truck. While working on the back of a trash truck on April 20, 1978, Appellant injured or smashed his hand. This injury neces-

sitated medical attention for the Appellant for the next two or three years, including surgery and hospitalization. This injury caused the Appellant to miss a considerable amount of work over the years. As of January 1, 1982, he was off at least from July 2 or 3, 1981, as a result of the injury. He was rebased to go back to work on or about March 15, 1982.

During the aforesaid period of time the Appellant filed a workers' compensation claim against Kingman County. On January 5, 1982, he was terminated from his job by the Appellee. He received actual notice of the termination of his job or employment, in writing, on February 19, 1982, after having inquired about it for some three weeks.

Mr. Powers was never notified by the Appellees, or anyone, prior to January 5, 1982, that he was to be terminated. He was never afforded an opportunity to be heard as to whether or not he should be terminated.

Appellant contended, in his pretrial questionnaire, 7(e), that he intended to present in evidence his written request for a hearing by the Board of County Commissioners, on January 17, 1982. The Court never decided the mixed question of fact as to whether or not the Appellant had requested a hearing before the Commissioners.

There was no written contract of employment between the Appellant and the Appellee.

On January 21, 1980, the Appellee Commission formally adopted what was received by the Court as Plaintiff's Exhibit 1, and entitled: *Personnel Rules and Regulations, Kingman County, 1980.*

All of Appellant's absences from work were with leave, especially from July 14, 1981, to January 5, 1982, and he was considered to be a good employee.

REASON WHY THE WRIT SHOULD BE GRANTED

The Kansas Supreme Court's Approval of the Petitioner's Firing by the Respondent County Without a Hearing Constituted a Violation of Petitioner's Right Under the U. S. Constitution to Due Process and Equal Protection of the Law.

In its conclusions of law, filed on March 11, 1987, the trial court below makes six distinct pronouncements. In three of those distinct pronouncements it states that Kansas is an "at will" employment State unless an express term of employment is contracted or there is an express contract of employment. That is not the law in Kansas now, nor has it ever been. Kansas has always recognized the theory of an implied contract of employment. The trial court below incorrectly considered only the standard of an express contract of employment in spite of the fact that both parties stipulated that there was no express written contract.

The Supreme Court of Kansas in *Johnson v. National Beef Packing Co.*, 220 Kan. 52, stated at the top of page 54:

> "This court follows the general rule that in the absence of a contract, *express or implied*, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party. . . . . (*Johnston v. Farmers Alliance Mutual Ins. Co.*, 218 Kan. 543, 545 P.2d 312;

Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449; *May v. Santa Fe Trail Transportation Co.*, 189 Kan. 419, 370 P.2d 390; *Swart v. Huston*, 154 Kan. 182, 117 P.2d 576; and *53 Am. Jur. 2d, Master and Servant*, Sect. 43, pp. 117-118.)" [Emphasis supplied.]

The high Court, throughout *Johnson*, supra, and the other cases and authorities cited therein, continually refer to the terms express or implied contracts of employment. Clearly a trial court must consider both theories in the type of case at hand.

In January, 1980, Kingman County adopted certain "Personnel Rules and Regulations". Those rules, which are a part of the record herein, provide in part:

"I-1 RULES ESTABLISHED

The following rules, regulations and other administration are established to:

(c) Develop a program of recruitment, advancement and *tenure* which will make the county service attractive as a career. [Emphasis supplied.]

I-2 ADMINISTRATIVE RESPONSIBILITY

The personnel program consists of the sum total of all policies and procedures related to personnel administration in the service of the county and shall be administered by the Board of County Commissioners. *The policies and procedures of the personnel program shall apply to all employees in the service of the county* except elected officials, court employees, and shared city-county staff or as otherwise noted in the text." [Emphasis supplied.]

The *Rules* also provide for a probationary period of employment and define a "permanent" employee as one who has completed the probationary period of employment.

Finally, the *Rules* provided for separation or termination in Article VII. The *Rules* only recognize and provide for the following types of terminations:

1. Removal for cause;
2. Resignation;
3. Retirement; and
4. Termination for lack of funds.

The *Rules* are explicit as to how each of these terminations are handled.

The Appellant contended ab initio, and still does, that he had an expectancy or entitlement to continued employment amounting to a property interest which is protected by the due process clause of the Fourteenth Amendment to the U. S. Constitution. This action is brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. 1983.

The Fourteenth Amendment to the U. S. Constitution prohibits a state from depriving a person of liberty or property without due process of law. The threshold question in this case is whether the Appellant possessed a constitutionally protected property interest in his employment with Kingman County. The determination of this issue is governed by the law of the State of Kansas. See: *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976). *Bishop*, supra, also relates in part:

> "A property interest in employment sufficient to invoke procedural due process protections need not be a formal contract or a tenure system, but may be created by ordinance or by implied contract."

The *Rules,* which governed the terms and conditions of the Appellant's employment with Kingman County, as well as most all other county employees, created an expectation of continued employment. Appellant was certainly not a part-time or seasonal employee. He was not an elected official. He was not on a combined city-county staff. The record below is replete with references to the use by all county officials of the "rule book" (The *Rules*). The record proves beyond a shadow of a doubt that the Appellant had passed the probationary period for permanent employees as prescribed in Article III of the *Rules.* The *Rules* provided for career employment with the County as well as tenure. Work weeks are defined. Compensation is provided for as well as fringe benefits - medical and hospital insurance, vacation pay, leave, retirement program, and training programs. The *Rules,* as stated before herein, provided, specifically, the ways an employee can be terminated. One reason is for cause. On their face, the *Rules* may fairly be read as creating a reasonable expectation of continued employment absent noncompliance with one of the specified reasons.

Kansas has consistently held that where a discharge is "for cause", notice and hearing are required. *Gorham v. City of Kansas City,* 225 Kan. 369, 373, 590 P.2d 1051 (1979), citing *Will v. City of Herington,* 201 Kan. 627, 443 P.2d 667 (1968). The high Court discussed "cause" as far back as 1934 in *Wichita Council v. Security Benefit Ass'n.,* 138 Kan. 841, 28 P.2d 976, wherein it stated:

"The word 'cause' . . . means what is sometimes spoken of as legal cause, or just cause, a substantial, reasonable or just cause, related to matters of a substantial nature, pertaining to duties or obligations imposed. (Citations omitted).

"The word carries with it the necessity of an appropriate charge, or accusation, ..."

In the case at hand the Appellee fired or terminated the Appellant on January 5, 1982, without the latter's knowledge. In fact, the record shows that the Appellant went from office to office in Kingman to find out when and why he was terminated. There is an indication that he requested a hearing on January 17, 1982, and didn't receive one. He received an actual, written notice of termination on or about February 19, 1982. The Tenth Circuit Court of Appeals of the U. S., in *Miller v. City of Mission, Kan.*, 705 F.2d 368 (1983), stated that:

"Due process also requires that one be given notice of the charges against him a reasonable time before the hearing is to take place. . . ."

"Moreover, except in emergency situations, due process requires that the hearing be held before termination becomes effective. . . ."

No pretermination hearing occurred here. No post-termination hearing was held. Further amplifying *Gorham*, supra, Appellant notes syllabus number one which states:

"A public employee who may be discharged only 'for cause' has a property interest in continued employment; such an employee is entitled to a due process hearing before termination."

It is abundantly clear that the Appellant had a protected property interest in this case. He was, as such, entitled to some kind of hearing before being deprived of this interest. He received none.

Tenure is defined by *The New Webster Encyclopedic Dictionary of the English Language* as:

> "The act, manner or *right* of holding property. . . ." [Emphasis supplied.]

The Kingman County *Rules* clearly applied to Appellant and were adopted for the explicit purpose of granting tenure to county employees. The language was explicit in granting the Appellant and others the right to continued employment under the terms and conditions set forth in the *Rules*.

This writer did not represent the Appellant in the matter below and is, therefore, at a disadvantage in recalling the exact procedure employed by the trial court. The case was filed in December of 1982. A decision was not rendered until March 11, 1987, a period of around 4½ years. The only evidentiary hearing was held on October 17, 1985, and it was not a trial as such. In actuality it probably amounted to, or was equivalent to, a summary judgment hearing. No trial, either to the court or a jury, was ever held. Suggested findings of fact and conclusions of law were submitted by both sides by the end of 1985. "Final Arguments" were scheduled at one time for July 18, 1986. The decision came, as shown by the record, on March 11, 1987.

If this case is treated as one involving summary judgment, as indeed it has to be, then the Court should consider the matter in light of *Morriss and White v. Coleman*

Co., 241 Kan. 501, decided June 12, 1987, and affirming an unpublished decision of the trial court filed November 26, 1986. The court held that there was the existence of a legitimate issue of fact whether there was an implied contract that employees would not be terminated without just cause, and summary judgment was precluded. The court further held that the facts must be more fully developed to determine liability for tortious interference. In our case at hand the trial judge failed to even discuss tortious interference. The case should be reversed pursuant to the dictates of *Morriss*, supra.

CONCLUSION

For the reasons and arguments stated herein, the Petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Kansas, to review that Court's decision which, in effect, affirmed the decisions of the Kansas Court of Appeals and the trial court denying the Constitutional rights of the Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
SUPREME COURT OF THE STATE
OF KANSAS

No. 87-60767-A

Joseph E. Powers,
Appellant,

v.

The Board of County Commissioners of Kingman County, KS, et al.,
Appellee.

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date August 26, 1988

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 60,767

IN THE
COURT OF APPEALS OF THE STATE
OF KANSAS

JOSEPH E. POWERS,
Appellant,

v.

THE BOARD OF COUNTY COMMISSIONERS OF
KINGMAN COUNTY, KANSAS, *et al.*,
Appellees.

MEMORANDUM OPINION

Appeal from Kingman District Court; WILLIAM H. YANDELL, judge. Opinion filed June 24, 1988. Affirmed.

Richard J. Rome, of Hutchinson, for appellant.

Mary Kathleen Babcock, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, for appellees.

Before SIX, P.J., LARSON, J., and PAUL E. MILLER, District Judge, assigned.

PER CURIAM: This is an appeal brought by Joseph E. Powers, appellant, from a decision of the Kingman County District Court in favor of the Board of

Commissioners of Kingman County. Powers had brought suit against Kingman County alleging that his employment with the county had been wrongfully terminated in violation of his civil rights. Powers raises three issues on appeal, which are stated hereafter. Since the facts are well known to the parties, only those necessary for discussion of the issues will be set forth herein.

Powers' first issue on appeal is whether the trial court erred in concluding as a matter of law that Kansas is an "at-will" employment state unless an express contract of employment exists. This issue is based upon Powers' interpretation of the trial court's decision, upon the fact that the parties stipulated that Kingman County had formally adopted certain personnel rules and regulations, and upon Powers' belief that the trial court gave no consideration to the possibility that an implied contract existed between Powers and the County based on the adoption of the personnel rules.

His second issue is whether an implied contract existed between the parties, thereby creating an expectation of continued employment amounting to a property interest protected by the due process clause of the Fourteenth Amendment. Because they are interrelated, we will treat these two issues together.

Powers cites *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976), in support of his conclusion. There, at page 54, the Supreme Court stated:

> "This Court follows the general rule that in the absence of a contract, express or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party, and the employee states no

cause of action for breach of contract by alleging that he has been discharged."

The trial court apparently refused to accept the stipulation that the personnel rules and regulations had been formally adopted and, in fact, specifically found that no formal adoption of them had taken place. It further found Powers had never been informed that he was employed under the rules and, even if the rules had been impliedly adopted, they did not amount to an express contract of employment.

No Kansas case that we have been able to find speaks to the effect of a trial court's refusal to accept a stipulation, especially where one party continues to profess reliance thereon, as appellant did in this case. However, even if the trial court should have accepted the stipulation of the parties, instead of relying on the clear evidence that the regulations had *not* been adopted (a holding we are not prepared to make), the facts of this case show that the trial court came to the correct conclusion.

Clearly, there existed no express contract of employment. Powers went to work for Kingman County on March 1, 1978. The rules and regulations, if adopted, were instituted in December 1979 or January 1980. They were not negotiated with any employee, including Powers, nor with any employee group.

In *Johnson*, the Supreme Court had this to say:

"[T]he manual was not published until long after plaintiff's employment. It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any ben-

> efits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy." 220 Kan. at 55.

The instant situation is the same. There are no facts to support either an express or an implied contract and, thus, appellant remained an "at-will" employee.

Powers' third issue is whether the trial court erred in failing to consider the theory of tortious interference with appellant's contract rights. Powers relies on *Morriss v. Coleman Co.*, 241 Kan. 501, 738 P.2d 841 (1987), in an attempt to establish such a claim. This theory was never raised by Powers at any time in the court below. "A point not raised before or presented to the trial court cannot be raised for the first time on appeal." *Kansas Dept. of Revenue v. Coca Cola Co.*, 240 Kan. 548, 552, 731 P.2d 273 (1987). For this reason, the issue is not properly before the court and need not be addressed.

Affirmed.

Supreme Court, U.S.
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No. 88-1060

In The

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vs.

THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Kansas Court of Appeals err in concluding that petitioner possessed no constitutionally protected property interest in his employment that entitled him to a pretermination hearing in accordance with the Fourteenth Amendment to the United States Constitution?

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No. 88-1060

In The

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October Term, 1988

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vs.

THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1] respectfully request that this Court deny the petition for writ of certiorari, which seeks

[1] Respondents are the Board of County Commissioners of Kingman County, Kansas; Charles Arensdorf, Supervisor of the County Division of Highways and Solid Waste Management; Natvar H. Patel, County Engineer; and Joe Dirks, Lee Vangiesen and William Milford, County Commissioners. Only the Board of County Commissioners has an interest in the matters presented in the petition; petitioner's claims against the other respondents were dismissed below for reasons undisputed in the petition.

review of the Kansas Supreme Court's August 28, 1988, denial of review of the unpublished opinion of the Kansas Court of Appeals of June 24, 1988, Appendices A and B, respectively, to the petition.

Upon request of the parties, the trial court severed for trial the issue of the existence of a property entitlement. The pretrial order reflecting that procedure is attached hereto as Appendix A.[2] The issue was tried to the court on October 17, 1985. The trial court's memorandum of findings of fact and conclusions of law is attached hereto as Appendix B.

STATEMENT OF THE CASE

Respondents contest petitioner's statement of the case in several respects, only one of which will be elucidated here. Petitioner states that on January 21, 1980, the respondent Board of County Commissioners formally adopted a document entitled *Personnel Rules and Regulations*. Petitioner's entire claim of a protected property interest in his employment is based upon entitlements allegedly flowing from this document.

The personnel handbook was prepared by a planning group to which the County subscribed. (V. 2, Tr., 120-21.)[3] The *Personnel Rules and Regulations* were never adopted by resolution of the Board of County Commissioners. (V.

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[2] Petitioner's tort claims have been abandoned or resolved against him in the state court proceedings.

[3] All citations are to the record on file with the Kansas Court of Appeals.

2, Tr., 124, 125.) Rather, the booklets were distributed to department heads for reference purposes. (V. 2, Tr., 124, 125-26.) Department heads utilized the document merely as a guideline rather than as conditions of employment. (V. 2, Tr., 88, 103.) The *Rules* booklet was not the product of negotiations with any employee or group of employees (V. 2, Tr., 78, 88), nor did petitioner provide any input as to the content of the booklet. (V. 2, Tr., 43, 88.) Indeed, the *Rules* document was never distributed to employees, and petitioner himself possessed no copy. (V. 2, Tr., 43.) Petitioner admitted at trial that he did not continue his employment with Kingman County in reliance upon the *Personnel Rules and Regulations*. (V. 2, Tr., 43.)

REASONS FOR DENIAL OF THE WRIT

Review on writ of certiorari is restricted to those few cases in which "special and important reasons" justify this Court's intervention. Sup. Ct. R. 17. No such reasons exist here. This case raises familiar Fourteenth Amendment analyses amply defined by prior decisions. *See, e.g., Bishop v. Wood*, 426 U.S. 341 (1976). Review of this case would enmesh this Court in state law evidence questions regarding stipulations that have never been addressed by Kansas appellate courts, a clearly inappropriate role. Further, the Court would necessarily address state law employment contract issues that Kansas appellate courts have already resolved against petitioner in this highly fact-bound case. This case is not a worthy candidate for review by writ of certiorari.

Petitioner Had No Protected Property Interest in Continued Employment with Kingman County and Was Not Entitled to the Due Process Protections of the Fourteenth Amendment

Petitioner contends that the *Personnel Rules and Regulations* created an implied contract of employment rising to the level of an entitlement – a protected property interest – in continued employment. Therefore, petitioner argues, he enjoyed a right to a due process hearing prior to his discharge on January 5, 1982. The entire basis of plaintiff's argument is the *Rules* booklet. The trial court found that set of rules was never adopted by respondents and was not in force and effect when petitioner was discharged.

Petitioner correctly states that the parties stipulated that the *Rules* were adopted by the Board of County Commissioners on January 21, 1980. At trial, however, *both parties* elicited testimony that the *Rules*, in fact, were not so adopted, but were merely utilized by department heads as a reference source. A clearly erroneous stipulation does not bind a Kansas finder of fact. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 709, 512 P.2d 438, 441 (1973). Further, both parties waived the right to rely upon the stipulation by placing the "formal adoption" question in issue. A stipulation may be abandoned or waived by the acts of the parties. *See Peddicord v. Franklin*, 270 Md. 169, ___, 310 A.2d 561, 567 (1973). Petitioner's counsel acquiesced in respondents' counsel's exploration of the issue, then surveyed it himself. (V. 2, Tr., 125, 147-51.) Counsel's conduct was wholly inconsistent with any belief that the mistaken stipulation was binding. Clearly

it was waived and the trial court was at liberty to rule, as it did, that the *Rules* were not adopted.

A Kansas Board of County Commissioners is a creature of the State that may exercise only the powers granted by statute in the manner specified by statute. Kan. Stat. Ann. § 19-101a(a) (1987 Supp.) extends to a commission the authority to "transact all county business and perform such powers of local legislation and administration it deems appropriate . . . ." Under the circumstances here at issue, such powers are effectuated only "upon passage of a resolution of the board and publication in the official county newspaper." Kan. Stat. Ann. § 19-101a(b) (1987 Supp.). The *Personnel Rules and Regulations* relied upon by petitioner were not even adopted informally, let alone in accordance with the statutory standards. (V. 2, Tr., 124, 125; Minutes of Jan. 21, 1980, Commission meeting, Ex. 0, 119, 126.) On the basis of the witnesses and evidence, the trial court correctly found the *Rules* were not in force and effect at the time of petitioner's discharge.

The Kansas Court of Appeals ruled that even had the trial court considered itself bound by the erroneous stipulation, petitioner could not establish his claimed entitlement to continued employment on the basis of the *Rules* booklet. A Kansas employer may enact employment policies without establishing an implied contract when the policies are mere unilateral expressions of employer intent. Particularly is that true when the policies are adopted after an employee is hired; there is no bargaining or other employee input as to the policies; there is no indication of mutual intent to be bound. *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976).

The theory of an employment contract implied in fact may be upheld in Kansas in very limited circumstances, but not upon the sole basis of an employment manual. *Wulf v. City of Wichita*, 644 F. Supp. 1211, 1222 (D. Kan. 1986); *Morriss v. Coleman Co.*, 241 Kan. 501, Syl. 1, 738 P.2d 841, Syl. 1 (1987); *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 718-19, 754 P.2d 465, 469-70 (1988), *rev. denied*, 243 Kan. No. 3 xxii (1988). Under Kansas standards, petitioner's reliance on the *Personnel Rules and Regulations* is clearly misplaced.

In Kansas, a public employee claiming a protected property right in public employment must base that claim in the state constitution, a statute, an ordinance, or a contract. *Stoldt v. City of Toronto*, 234 Kan. 957, 964, 678 P.2d 153, 160 (1984); *Riddle v. City of Ottowa*, 12 Kan. App. 2d 714, 716-18, 754 P.2d 465, 468-69 (1988), *rev. denied*, 243 Kan. No. 3 xxii (1988). Petitioner points to no such grounding for his claim for the best of reasons: it does not exist. The Kansas Court of Appeals correctly ruled against petitioner, and no further review is warranted.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, KINGMAN COUNTY, KANSAS
CIVIL DEPARTMENT

JOSEPH E. POWERS, Plaintiff	)	
vs.	)	Case No. 82 C 54
THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, et al., Defendants	)	(Filed October 17, 1985)

PURSUANT TO CHAPTER 60
OF KANSAS STATUTES
ANNOTATED

PARTIAL PRETRIAL CONFERENCE ORDER

Appearances

On Wednesday, October 9, 1985, the above-entitled matter comes before the Court, Hon. William H. Yandell presiding. Plaintiff appears by M. Ralph Baehr, his attorney, and all defendants appear by William A. Hensley, one of their attorneys, Curtis E. Watkins, Kingman County Attorney, also appearing of record.

Nature of Action

Plaintiff contends that he was terminated from employment by Kingman County, Kansas, which is admitted by defendants, it being plaintiff's contention that such termination (1) violated his civil rights and (2)

was retaliatory because plaintiff had made a workers' compensation claim against Kingman County, both (1) and (2) being absolutely denied by defendants, who content, among other things, that plaintiff was terminated only because Kingman County required an employee able to perform necessary work which was previously done by plaintiff.

Amendments, Clarifications and Orders

Plaintiff makes no claim for bodily injuries by reason of his termination. All claims for punitive damages against Kingman County have been dismissed.

Upon Motion of the individual defendants and upon hearing the statements, stipulations and arguments of counsel appearing, it was by the Court ordered that plaintiff's action against the individual defendants, personally, should be and the same were dismissed, all following statements as to the extent of available evidence.

Plaintiff's Contentions

Defendant, Kingman County, acting under color of state or local law, custom, usage and policies, and in violation thereof together therewith plaintiffs consitutional [sic] rights, violated plaintiff's civil rights (42 U.S.C.A. 1983) and wrongfully terminated plaintiff for filing a compensation claim. Plaintiff claims that he was entitled to and denied an opportunity to be heard with regard to his termination, in alleged denial of procedural due process he contends to have been an entitlement. Plaintiff claims he is entitled to relief as follows:

A. Judgment against the defendants in an amount yet to be determined which will fully compensate him for his lost wages which are ongoing, his mental anguish and suffering;

B. Reinstatement to his former position or a due process hearing;

C. Back wages as though plaintiff had been employed by the defendants to the time of trial herein;

D. Future wages until such time as the plaintiff is reinstated by the defendants in his former position;

E. Seniority status which plaintiff would have received had he been continuously employed by the defendants after his termination in January, 1982;

F. Reasonable promotions which the plaintiff would have received to the time of trial, including raises and fringe benefits;

G. All fringe benefits and values of insurance, including health and accident and disability and worker's compensation insurance to which the plaintiff would have been entitled had he been employed by the defendants.

Defendants' Contentions

Defendants deny that any of plaintiff's civil rights, if any are applicable, which is denied, have been infringed. Plaintiff was terminated solely because Kingman County required a road worker to do the job which the plaintiff had done previously. The Kingman County Personnel Rules and Regulations were not part of any contract of

employment between plaintiff and defendants and were adopted after plaintiff was hired. The fact that plaintiff properly filed a workers' compensation claim and has maintained it for a number of years, to the present date, both before and after his termination, had absolutely nothing to do with the fact of such termination.

Defendants incorporate by reference all allegations made in the Combined Answer of Defendants, filed herein, as amended by the Journal Entry entered as a result defendants' Motion filed on or about January 7, 1985. Defendants also incorporate all factual and legal contentions set forth in Defendants' Trial Brief and Defendants' Tentative Requested Jury Instructions.

Witnesses and Exhibits

Plaintiff lists Joseph E. Powers, Mrs. Joseph E. Powers, Clarence Henning, James Woodson, Ova Parsons, Verl Dennison, Del Wyman, Timothy Paul and all witnesses listed on behalf of defendants.

Defendants list Charles Arensdorf, Natvar H. Patel, Joe Dirks, Lee VanGiesen, William Milford, Donna R. Brown, Larry T. Solomon, Don D. Gribble, all past and present Commissioners, Kingman County records custodians and all witnesses listed on behalf of plaintiffs.

As exhibits, the parties list all documents obtained and/or exchanged in the course of discovery procedures, all personnel records of the plaintiff, all records pertinent to plaintiff's workers' compensation claim, the Personnel Rules and Regulations, Minutes of the Commission meetings relating to plaintiff and such other documentary

information exchanged in advance of trial which may be competent, relevant and material.

Mixed Issues of Law and Fact

1. Did plaintiff have an entitlement to continued employment and/or a hearing with regard to termination?

2. Was plaintiff's employment one terminable at the will of either party?

3. Has there been a deprivation of any constitutionally protected right of plaintiff?

~~4. If applicable in light of the above, did plaintiff demand a hearing and, if so, did Kingman County receive such demand and deny a hearing?~~

4.~~5~~. As a matter of common law, was plaintiff improperly terminated because he made a workers' compensation claim?

5.~~6~~. Were all actions of defendants in good faith, including but not limited to facts with regard to the advice of legal counsel, Larry T. Solomon, then County Attorney, as to the termination of plaintiff?

6.~~7~~. If applicable, to what relief is plaintiff entitled?

Further Order

Having heard the statements, stipulations and arguments of counsel appearing, it is by the Court considered, ordered and decreed as follows, to wit:

(1) The jury trial, scheduled for October 16, 1985, should be and the same is hereby continued to a future date as yet undetermined by the Court; and

(2) At 9:30 a.m. on Thursday, October 17, 1985, there shall be a hearing before the Court, with evidence if necessary, dealing with questions of law, properly determinable by the Court, in connection with plaintiff's claims that he has been denied procedural due process and that his civil rights have been violated.

IT IS SO ORDERED.

/s/ William H. Yandell
Judge of the District Court

Approved:

Nieto, Baehr & Hollander

By /s/ M. Ralph Baehr
Attorneys for Plaintiff

Curtis E. Watkins, Kingman County Attorney,
and
Sherwood & Hensley

By /s/ William A. Hensley
Attorneys for Defendants

APPENDIX B

IN THE DISTRICT COURT OF
KINGMAN COUNTY, KANSAS.

JOSEPH E. POWERS, Plaintiff,	)	
	)	
vs.	)	No. 82 C 54
THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, et al.	)	(Filed March 11, 1987)
Defendants.	)	
	)	

FINDINGS OF FACT

1. The Plaintiff was hired under a CETA Program on March 1, 1978, as a laborer for the Road and Bridge Department.

The CETA Program was for one (1) year, and in March 1979, due to the termination of the CETA funding, Plaintiff was placed on the Kingman County payroll as an employee.

2. No formal written contract was entered into between Plaintiff and Defendant.

3. Plaintiff was employed by Defendant, in April, 1978, as a member of a trash collection crew, and suffered injury to his hand, arising out of and in the course of his employment with Defendant.

4. In 1978, Plaintiff was absent a total of 4 days due to this injury. The injury required surgery and in 1978 Plaintiff was absent 81 days, in 1980 Plaintiff was absent 38 days, and in 1981 Plaintiff was absent 145 days.

The days absent, were in addition to certain paid vacation times totaling 85+ days from 1978 thru 1981.

5. The Plaintiff was absent from work from July 14, 1981 through January 5, 1982.

6. On January 5, 1982, Defendant voted to terminate Plaintiff due to prolonged absences, and the need to have employees, available to perform their assigned jobs.

7. The Defendant informed Plaintiff on his termination by letter on February 19, 1982, and the basis of the grounds for termination.

8. The Plaintiff has never reapplied to Defendant, for employment, however Plaintiff was released from medical care in March 1982.

9. In late 1979, the Defendant agreed to have prepared and presented to them a booklet entitled "Kingman County Personal Rules and Regulations" for later adoption upon Defendant's approval.

This booklet was completed by an agency from Pratt, Kansas.

The various department heads of Defendant met and discussed various aspects of this book, but after completion and distribution the Defendant, never formally adopted the same.

10. The "Personal Rules and Regulations" were not in force and effect at the time Plaintiff was terminated, nor was he ever, or any other employee informed, they were employed under those Rules.

11. At the time of Plaintiff's employment and discharge, no Public Employee Union or Collective Bargaining Agreement, existed between Defendant and its employees.

12. Defendant entered into certain agreements, with Plaintiff furing [sic] the time of injury, to allow Plaintiff to maintain certain health insurance for Plaintiff's benefit and during the Workers Compensation Claim, by Plaintiff. The Defendant did not discharge Plaintiff, because of the Workers Compensation Claim, but in fact assisted Plaintiff in such insurance agreements.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter.

2. Kansas is an "at will" employment State, unless an expressed term of employment is contracted.

Under this theory an employer is entitled to discharge an employee at any time and for any reason.

3. The Plaintiff alledges [sic] a property interest under Federal Law based upon the never adopted rules and procedures of Kingman County, Kansas.

4. To be effective a County Commission must adopt procedures under the Laws of Kansas for the same.

Even had such rules been adopted by implication, they do not amount to an expressed contract of employment.

5. Absent an expressed contract of employment Plaintiff has no vesting of rights to continued employment.

6. Judgment must be for Defendant, upon Plaintiff's claim for relief.

Dated: March 10, 1987

/s/ William H. Yandell
William H. Yandell
District Judge